UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/738,446	12/16/2003	Thomas D. Kelly	DI-5928 (112713-457)	8102

29200 7590 12/20/2006

BAXTER HEALTHCARE CORPORATION
1 BAXTER PARKWAY
DF2-2E
DEERFIELD, IL 60015

EXAMINER
DEAK, LESLIE R

ART UNIT	PAPER NUMBER
3761	

MAIL DATE	DELIVERY MODE
12/20/2006	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/738,446	Applicant(s) KELLY ET AL.	
	Examiner Leslie R. Deak	Art Unit 3761	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 08 November 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: *See Continuation Sheet*. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: *14-38*.
   Claim(s) withdrawn from consideration: *1-13 and 39-107*.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER

Continuation of 3. NOTE: Applicant's amendments to claims 99-107 require new search and consideration, since the claims were withdrawn from examination in the Final Office Action of 21 August 2006.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that if pump 11 acts as the isolation device, it is inoperable to deliver a volume of fluid to the extracorporeal circuit as claimed by applicant. However, Examiner did not name pump 11 as the isolating device. Rather, clamps 17, 18 serve to isolate the filter from the patient, rendering the Bene device capable of operating as claimed by applicant.

Applicant further argues that the finality of the Office Action of 21 August 2006 should be withdrawn due to an alleged new grounds of rejection. Examiner notes that new grounds of rejection (Bene in view of Burbank) were applied only to the amended claims (21-16, 27-32, 38). Examiner notes that the originally filed claims (namely, independent claim 14), were originally rejected under 35 UCS 102(b) to Bene, and the claims stand rejected as such. Since the claims remain rejected under the same statute as anticipated by the same reference, the grounds of rejection have not changed.

Furthermore, Applicant mischaracterizes Examiner's interpretation of the reference in the Final Rejection. Applicant alleges that Examiner interprets the device disclosed by Bene to be capable of isolating filter 4 from the medical device supply 10. In fact, Examiner notes in page 3 of the Final Rejection that the Bene device is capable of isolating filter device 4 from the patient, not the medical device suppoly 10. The Nonfinal Rejection pointed out that the Bene device is capable of isolating the circulating blood from the patient, while the Final Rejection points out that the Bene device is capable of isolating the filter from the patient. Both statements are correct, since clamps 17, 18 of the Bene device may perform both functions simultaneously. Examiner changed the wording of the rejection in order to clarify the rejection in light of Applicant's arguments. However, the substance and grounds of the rejection remained constant from the beginning of prosecution forward. Therefore, the finality of the Final Rejeciton is proper.

Applicant further traverses Examiner's interpretation of the term "bolus" in the Final Rejection, pointing to paragraph 0064 of the specification to distinguish a bolus from the fluid provided to the patient from the Bene system. However, applicant's citation fails to distinguish a bolus from another volume of fluid (and, in fact, considers delivery of "a bolus or volume of fluid"), and also cites a loss of too much liquid from a patient's vascular system as a reason for such fluid administration. Bene discloses the same operation--in order to compensate for the loss of fluid in a patient, the Bene system may deliver a fluid to the patient from reservoir 10 (see column 3, lines 15-22). Therefore, it appears that Examiner's interpretation of "bolus" as a volume of replacement fluid, as disclosed in Bene, is consistent with applicant's own definition, as provided in paragraph 0064.

GA 11Dec06